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October 13, 1998

BY HAND
Magalie Salas, Esquire
Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

Re: CS Docket No. 98-120
Carriage of the Transmissions of Digital Television Broadcast Stations

Dear Ms. Salas:

Transmitted herewith, on behalf of the Arkansas Broadcasters Association, are an original and four copies of its Comments in the above captioned proceeding. Please contact this office if there are any questions regarding this matter.

Respectfully submitted,
Fletcher, Heald & Hildreth, P.L.C.

Frank R. Jazzo
Counsel for
The Arkansas Broadcasters Association

Enclosure

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Carriage of the Transmissions of Digital Television Broadcast Stations	)	CS Docket No. 98-120
	)	
Amendment of Part 76 of the Commission's Rules	)	

COMMENTS OF THE ARKANSAS BROADCASTERS ASSOCIATION

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COMMENTS OF THE ARKANSAS BROADCASTERS ASSOCIATION

The Arkansas Broadcasters Association ("ABA"), by its attorneys, hereby submits its comments in response to the Commission's July 9, 1998 Notice of Proposed Rulemaking (*"Notice"*) in the above-captioned proceeding. In these comments, the ABA urges the Commission to be mindful of the need to provide reasonable assurance of cable carriage to stations in smaller markets, if the benefits of digital television are to be realized in a timely manner by viewers throughout the Nation.

I. Introduction

The ABA represents broadcasters throughout the State of Arkansas, including sixteen stations serving primarily three television markets. The size of the members' markets range from Little Rock (the 56th largest television market in the U.S.) to Jonesboro (the 181st largest market in the U.S.). While the member stations may not be in the nation's largest markets, their commitment to providing high quality local service to their communities is as great as that of any station. That commitment to high quality local service will continue as member stations transition into digital broadcasting.

II. The Commission's Mandatory Carriage Rules Must Provide Reasonable Assurance, Through at Least a "Phased-In" Approach, That Viewers Will Have Access to All Local DTV Signals During the Transition Period.

The ABA recognizes that the issues raised in this proceeding present difficult choices for the Commission, involving the allocation of the burdens of the transition from analog broadcasting to DTV. The ABA requests, however, that the Commission remain mindful of the significant burdens already imposed on broadcasters in meeting their obligation to deliver DTV to their viewers. The Commission must also remain mindful of the fact that DTV must-carry rules are no more than an extension of the must-carry provisions enacted by Congress in 1992.[1] The policy basis for Congress' enactment of must-carry requirements was to ensure that local stations retain the economic viability necessary to continue providing important local programming to viewers throughout the country. The Supreme Court relied primarily on the factual record supporting that policy, in its decision upholding the must-carry provisions of the 1992 Cable Act.[2] Now, in merely applying existing must-carry policy to the digital era, the very same concerns regarding the economic viability of stations mandate a broad application of the must-carry requirements to all DTV stations.

In the 1992 Cable Act, Congress made explicit findings regarding the importance to viewers of programming from local broadcast stations, and the necessity that such

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[1] Cable Television Consumer Protection and Competition Act of 1992, P.L. 102-385, 106 Stat.1460 (1992) (the "1992 Cable Act").

[2] *Turner Broadcasting System v. FCC,* 117 S.Ct. 1174; 137 L.Ed. 2d 369 (1997).

stations obtain cable carriage in order to retain the economic viability to produce such programming:

> (10) A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is substantial governmental interest in ensuring its continuation.
>
> (11) Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.
>
> (12) Broadcast television programming is supported by revenue generated from advertising broadcast over stations. Such programming is otherwise free to those who own television sets and do not require cable transmission to receive broadcast signals. There is a substantial governmental interest in promoting the continued viability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.

1992 Cable Act at Sec. 2(a).

These findings were not based on speculation, but rather on a record built in extensive hearings, over many years.[3]

In upholding the must-carry provisions of the 1992 Cable Act, the Supreme Court explicitly stated that Congress had substantial evidence that mandatory cable carriage was necessary for preserving the Nation's over-the-air broadcast system. *See*, *Turner*, 137 L.Ed. at 399-400. The Court concluded that this policy basis for must-carry was the substantial governmental interest necessary for must-carry to pass muster under the First Amendment.

ABA urges the Commission to recognize that in the present proceeding, existing must-carry policy is being applied to the DTV signal of the very same stations that Congress recognized must receive carriage if viewers are to continue to receive the

---

[3] *See*, S. Rep. 102-92, 102d Cong. 1st Sess. ("Senate Report") at page 4.

benefits of local programming. Nothing has changed in the intervening years in regards to the basic relationship between cable carriage and the economic viability of a station. Indeed, increased cable penetration in the intervening years has made stations even more reliant on cable carriage to reach viewers, and thus even more vulnerable without carriage.

What has changed in the intervening years is the advent of DTV and the immense costs associated with converting to digital transmission. There is no need to repeat here the details of those costs or the special burdens such a conversion will impose on smaller market stations that have less advertising income to finance the conversion costs that are largely identical regardless of the size of a station's market: the Commission has already recognized and acknowledged such special burdens in the Advanced Television proceeding. *See, e.g., Advanced Television Systems, Memorandum Opinion and Order*, 13 FCC Rcd 6860, 6886 (1998); *ATV Fifth Report and Order*, 12 FCC Rcd 12809, 12835(1997); *ATV Third Report and Order*, 7 FCC Rcd 6924, 6941, 6946-47 (1992). In that proceeding, the Commission created an extended construction schedule for smaller market stations in order to ease the burden on those stations. But in this proceeding, the Commission must complete what it started: it must provide smaller market stations with reasonable assurance of carriage of their DTV signal, which is necessary in order to obtain and justify the financing necessary to construct DTV facilities. Without some reasonable assurance of carriage during the transition from analog to digital broadcasting, construction of DTV facilities in smaller markets will be delayed or prevented, and the benefits of DTV will be withheld from viewers in those markets. Such a result is inconsistent with Congressional policy set

forth in the 1992 Cable Act, inconsistent with Congress' mandate that the Commission rapidly promote the advent of DTV, and inconsistent with Congressional policy stated in Section 1 of the Communications Act.[4]

In sum, in order to ensure that the benefits of DTV are received on a timely basis by viewers in smaller markets, the Commission must enact DTV must-carry rules that provide reasonable assurance to smaller market broadcasters that their DTV signal will have cable carriage during the transition from analog to digital. Such assurance will not be created by the "System Upgrade", the "Either-Or", the "Equipment-Penetration", the "Deferral" or the "No Must Carry" proposals set forth in pages 24-26 of the *Notice*. ABA urges instead adoption of either the "Immediate Carriage" proposal, or the "Phase-In" proposal providing for addition of up to four new DTV signals per year per system, in the order that stations commence broadcasting in DTV. The Phased-In approach would give smaller market stations the needed reasonable assurance of carriage, while minimizing the impact of DTV carriage on cable operators.

Lastly, the ABA urges the Commission to be mindful of a similar dilemma in the early days of the television era: the apparent nonviability of UHF stations, and the resulting lack of use of the UHF spectrum. The Commission made numerous attempts to resolve the problem by, for example, "de-intermixing" communities to require all broadcasters in a certain community to use UHF frequencies. However, such solutions were not productive, because many television sets were not constructed to even receive UHF signals. The only practical solution was one mandated by Congress: the

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[4] Section 1 states that the purpose of Commission regulation is to make wireline and radio communications services "... available, so far as possible, to all people of the United States ... " (emphasis added).

"All Channel Television Receiver Act" required all TV sets to be able to receive signals from UHF stations. While cable systems were only in a nascent stage at that time, in the present situation, cable systems are now as much a "bottleneck" to their subscribers for reception of DTV signals, as non-UHF-capable receivers were to viewers then for reception of UHF stations. As shown in these Comments, the Commission must take similar steps to ensure that viewers seeking the benefits of DTV do not suffer the delayed introduction and near failure suffered by viewers attempting to watch UHF stations in the not so distant past.

III. Comments Regarding Other Issues Raised in the *Notice*

In addition to seeking comments on proposals addressing the application of must-carry to the transition from analog to digital broadcasting, the Commission raised issues on a variety of related topics. ABA's comments on some of the more important issues are set forth below.

A. *Reliance on Retransmission Consent Negotiations is Not a Practical Approach to Achieving Interim Carriage of DTV Signals.*

In paragraph 33 of the *Notice*, the Commission states that it

> has been estimated that approximately 80 percent of commercial television broadcasters elected retransmission consent on some cable systems, rather than must-carry, during the 1993-1996-election cycle. Thus, assuming this information is accurate, the question arises as to whether the general pattern will be repeated with respect to digital broadcast television stations during the transition period. ... If it is repeated, however, it is possible that many of the transitional issues involved in this proceeding will be resolved through retransmission consent negotiations. (Emphasis added).

However, the premise of the Commission's suggestion above is seriously flawed, and accordingly, while some stations may be able to obtain DTV carriage through retransmission consent negotiations, because many (perhaps the majority of) stations

do not have the leverage to obtain DTV carriage through retransmission consent, the proposal must be rejected as a dangerous and impractical overall solution to the problem.

First, the factual premise of the Commission's proposal to rely primarily on retransmission consent is questionable even as applied to the 1993 election cycle: the one journal article relied upon for the "80 percent" figure itself cites only one article from the *San Francisco Chronicle*. Even if the *Chronicle* were an authoritative source on the broadcasting and cable TV industries (and there is no evidence of such), that one article is hardly a rational basis for determining such an important issue as the method of implementing DTV carriage.

In fact, while a significant number of stations may have elected retransmission consent ("RC") in the initial 1993 cycle, they did so believing that they could obtain substantial compensation from cable operators. In light of the disappointing experience in that regards in 1993, when the election cycle came up again in 1996, ABA believes that many more broadcasters elected must-carry. The reasons that a large number of stations elected must-carry in 1996 are obvious: electing RC negotiations leaves open the significant possibility that if terms of an RC Agreement are not agreed upon by the operator and the station, then the operator will not carry the station. Those stations do not have the leverage to force the cable operator to agree to carriage through the RC negotiation process, and those stations will not elect RC, but rather will elect must-carry.

The fact that stations will have two signals in the transition era, will likely decrease the leverage that any station currently has to obtain carriage through RC

negotiations. Those stations lacking leverage in the analog era will certainly not gain leverage in the transition to DTV; rather, they will have less leverage: if a cable operator does not want to carry Station A's analog signal, it will be even less willing to carry both Station A's analog and digital signals. Similarly, even those stations that currently have the leverage to obtain carriage through RC negotiations, will likely not have the same leverage to demand carriage of a second signal.

In sum, many stations will not be electing RC during the transition era, and even stations that currently elect RC will likely lack the leverage to use negotiations to obtain carriage for a second DTV signal. Accordingly, the proposal to primarily rely on RC negotiations to handle the carriage of DTV signals is based on a flawed premise, and would dangerously leave many or most stations to "fend for themselves" in obtaining carriage of their DTV signal. Ultimately, the result will be less stations obtaining carriage of their DTV signal in the transition, resulting in less viewers obtaining the benefits of DTV.

An ironic twist to the proposal to use RC negotiations to obtain DTV carriage is that the only stations that will be able to do so are the ones that are less likely to have trouble obtaining DTV carriage: affiliates of the major national networks, on cable systems close to their city of license. This excludes many of the stations Congress was specifically concerned about in enacting must-carry: the small independent stations. Congress was specifically mindful of the damage that cable operators can impose on such stations through manipulation or denial of carriage. *See, e.g.*, H.R. Rep. No. 102-628, 102d Cong., 2d Sess., at page 51:

> The record before the Committee persuasively demonstrates that the substantial governmental interest in promoting competition in the video

> marketplace will be threatened if cable systems have unfettered discretion to drop local broadcast signals, carry them in a disadvantageous manner .... This was pointed out to the Committee in the testimony of Thomas L. Goodgame, Chairman of the Television Board of the National Association of Broadcasters: 'Cable systems are dropping broadcast signals or demanding payments or other concessions for carriage.... This is particularly true of independent stations, since many of their programming choices are being copied by some cable-only programmers. If a cable operator believes he can increase profits by dropping (or not adding) an independent station and forcing viewers to switch to similar cable-only programming, then the independent station will be dropped or not added.

Accordingly, while carriage of DTV could be part of RC negotiations, it would be dangerous and impractical for the Commission to rely on RC negotiations as the primary tool for implementing cable carriage of DTV signals.

B. There is No Rational Basis for Repealing Program Exclusivity Rules.

In paragraph 96 of the *Notice*, the Commission seeks comments as to whether program exclusivity rules (those addressing syndicated exclusivity and network non-duplication) "are applicable in the digital age, with or without must-carry, and whether it would be possible to repeal these rules and instead rely on the retransmission consent provisions of Section 325 of the Act to protect the rights in question." This shocking proposal is again based on the flawed premise (discussed above) that most or all stations will elect RC, and accordingly the proposal should be discarded for that reason alone. However, an even more dangerous flaw in the proposal is that it ignores a basic premise of the utility of the program exclusivity rules: exclusivity can be demanded by a station even if that station is not currently carried on the cable system that is the recipient of the claim. Thus, many stations that rely on the protection of program exclusivity rules would not be able to obtain similar protection in the context of RC negotiations, because they would not be participating in such negotiations with cable

operators that do not carry the station demanding protection. Accordingly, the proposal to make program exclusivity protection part of RC negotiations would not just "shift" the source of protection from one rule to another, but rather, would strip the protection from many stations that currently are entitled to the protection, without giving those stations a substitute means for obtaining that protection. ABA does not believe that this is the result intended by the Commission.

In addition to stripping program exclusivity protection from stations that are currently entitled to such protection, the Commission's proposal would interfere with the RC negotiations that the Commission suggests could replace exclusivity rules. Currently, when a station enters into RC negotiations with a cable operator, one factor that the cable operator must consider is that if it denies carriage to the station, that station may still enforce exclusivity demands on the operator, denying that operator access to certain network and/or syndicated programming. If program exclusivity rules were to be eliminated, and thus this consequence for denying carriage to a local station eliminated, not only would the current balance in RC negotiations be further shifted in favor of cable operators, but the overall result would be more carriage of programming that is "distant" to local subscribers, and less carriage of local programming. Such a result is inconsistent with both the goals of this proceeding and with the policies that lead to the enactment of program exclusivity rules.

In light of the importance of program exclusivity rules to the market for and marketing of local television programming, the ABA is surprised that the Commission would propose such a radical step in a proceeding addressing such a significantly different topic as DTV must-carry. Indeed, given the substantial and extended

rulemaking proceedings employed by the Commission to create and modify the program exclusivity rules, and the subsequent litigation over the proceeding to modify the rules, if the Commission believes that the program exclusivity rules need to be revised again, then it would be wise to initiate a separate proceeding on such matters.

C. *The Burden of Interim Carriage of DTV Signals Will Not be Substantial, Even on "Small" Systems.*

Congress and the Commission have created an ambitious goal: the rapid, nation-wide implementation of a new television broadcast system. While there will likely be significant benefits to viewers from the advent of DTV, fulfilling this ambitious goal will no doubt impose significant burdens on broadcasters, at least in the short run. Yet while the rapid implementation of DTV through DTV must-carry rules may impose some burden on cable operators, it should be remembered that the structure of must-carry rules, and other factors, inherently limit that burden, even for "small" cable systems, regardless of how such systems are defined.

First, as set forth in paragraph 51 of the *Notice*, the provision of Section 614 of the Act limiting must-carry obligations to one-third of a system's channel capacity ought to continue to apply even in the DTV transition era. ABA believes that most cable operators nationwide do not currently devote that one-third of their channel capacity to must-carry stations, because the channel capacity of most cable systems is significantly more than three times the number of local commercial television stations.[5] Thus, while cable systems would likely have to increase their number of must-carry

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[5] *E.g.*, most systems with 60 channels do not currently devote one third of their capacity to must-carry, because most markets do not have 20 local commercial stations.

the transition, many or most of those systems still would not meet the one-third capacity cap. In any case, the one-third channel capacity cap would not change, and thus the overall obligation set forth in the rules would not be changed from the current overall obligation.

Second, it is widely recognized in other contexts that cable systems are as a general matter eager to expand their channel capacity for a variety of reasons,[6] and are in fact doing so. As operators continue to upgrade their systems in the next few years, increased new channel capacity should more than accommodate the few additional channels required in most markets for carriage of local DTV signals.

ABA requests that the Commission remain mindful of these principles in considering whether any exemptions from DTV must-carry obligations should be provided for "small" cable systems. Furthermore, it should be noted that Section 614 (b)(1)(A) of the Act already provides an exemption from must carry requirements for truly small cable operators, *i.e.,* those with fewer than 12 activated channels and 300 subscribers. Even if the Commission has Congressional authority to determine whether DTV stations are entitled to must-carry (a point which ABA does not concede), the Commission does not appear to have the authority to create its own exemption from must-carry requirements, different from the one explicitly mandated on this topic by Congress in the Communications Act.

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[6] Among the pressures on operators to expand capacity are the need to compete with multi-channel digital satellite services, the desire to provide a wide variety of broadband services, and pressure from franchising authorities to increase capacity as part of a franchise renewal.

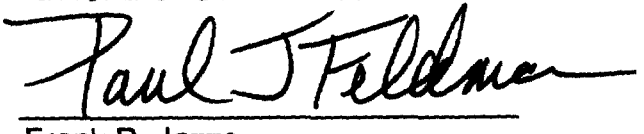
Lastly, it should be noted that "small" cable systems are often located in smaller television markets. In considering the possibility of exempting small cable systems from the obligation to carry DTV signals, ABA asks the Commission to be cognizant of the fact that, as extensively discussed above, smaller market viewers are as entitled to the benefits of DTV as viewers in larger markets.

IV. Conclusion

In order to bring the benefit of DTV to viewers throughout the Nation, stations in all markets must have some reasonable assurance that their digital signal as well as their analog signal will be carried by cable operators during the transition period. Reliance on retransmission consent negotiations will not work, and accordingly, must-carry is required if DTV is to be rapidly initiated on a nationwide basis.

Respectfully submitted,

THE ARKANSAS
BROADCASTERS ASSOCIATION



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